

**IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCHES "B": HYDERABAD**

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER  
AND  
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

ITA No.	A.Y.	Appellant	Respondent
1701/Hyd/14	2009-10	M/s.HIL Limited (Formerly known as M/s.Hyderabad Industries Limited) HYDERABAD [PAN: AAACH2676Q]	Addl. Commissioner of Income Tax, Range-2, HYDERABAD
1702/Hyd/14	2010-11		
1703/Hyd/14	2011-12		
647/Hyd/19	2012-13		ACIT, Circle-2(2), HYDERABAD
555/Hyd/17	2013-14		

For Assessee : Shri A.V.Raghu Ram, AR  
For Revenue : Shri Y.V.S.T.Sai, CIT-DR

Date of Hearing	:	16-10-2019 & 17-10-2019
Date of Pronouncement	:	22-11-2019

**ORDER**

**PER D.S. SUNDER SINGH, A.M. :**

These appeals filed by the assessee are directed against the orders of the Commissioner of Income Tax(Appeals),Hyderabad& Guntur, for the respective assessment years. Since the facts and issues involved in all these appeals are common, all these appeals are clubbed, heard and are being disposed-of by way of this common order as under.

**I.T.A. 1701/Hyd/2014, A.Y.:2009-10**

2. Brief facts of the case are that, assessee is a company, engaged in the business of production of asbestos cement sheets and exports, fittings of installation panels etc. For the AY.2009-10, the assessee filed it's return of income on 30-09-2009 and declared the income of Rs.66,45,31,440/- under the normal provisions of the Income Tax Act [Act]. The return was processed u/s.143(1) of the Act and the case was selected for scrutiny, notice u/s.143(2) of the Act was issued and duly served on assessee.

3. The Assessing Officer (AO) passed the order u/s.143(3) of the Act, dt.28-12-2011, by making the following additions/disallowances to the returned income:

		Amount (Rs)
1.	Sales incentives paid to stockists disallowed	9,23,76,914
2.	Difference in inventory added	3,80,31,000
3.	Director's commission disallowed	50,00,000
4.	Difference in depreciation	13,57,000

4. The first issue in appeal for the A.Y.2009-10 is the disallowance of sales incentive to stockists on the ground that the assessee had not deducted the tax at source as required u/s.194H of the Act. The AO treated discounts given to stockists as commission and applied the provisions of Section 40(a)(ia) of the Act to the case and accordingly disallowed the amount of Rs.9,23,76,914/- and added back to the income returned by the assessee.

5. Against the order of AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) confirmed the addition made by the AO. Ld.CIT(A) held that as per Section 194H of the Act, any payment made directly or indirectly by the assessee or any payment for any services in the course of buying or selling of the goods or any income is

credited to any account by any other name in the books of account of the persons liable to pay such income credited should be deemed to be credited to the account of payee and the provisions of section shall apply. Accordingly, Ld.CIT(A) held that TDS is required to be deducted on the payments made to stockists u/s 194H of the Act and the AO rightly disallowed the expenditure u/s 40(a)(ia) of the Act. The Ld.CIT(A) further viewed that this view is supported by the decision of Hon'ble ITAT, Jaipur in the case of Hindustan Coca Cola Beverages P. Ltd., Vs. ITO(2005) 097 ITD 0105 and accordingly confirmed the order of the AO.

6. Against the order of Ld.CIT(A), assessee filed appeal before the Tribunal.

7. During the appeal hearing, Ld.AR submitted that the payment made to the stockists goes to direct credit of the customers, hence argued that the payment is in the nature of discount but not the commission. In the Books of HIL, the discounts were accounted for in the discount account and as at the end of the year the same was transferred to the sales a/c and the discount accounts were nullified. The amount of discount transferred to sales reduces the sales value to

the extent of discounts and the reduced value appear in Profit & Loss A/c. The discounts, which were given as a part of normal credit were accounted through invoices and discounts given over and above the normal credits, in accordance with the different claims approved by the management are accounted through credit notes. Discounts goes to the account of customers directly. The stockists act as direct customers to the company in certain transactions, except where the orders are received from customers through the stockists for which the commission is paid to stockists and no discount is paid to the stockists on such transaction. Sales are made directly to the stockists, who in turn sell the material to the customers and HIL is not at all involved in such direct sales made by its stockists to their customers. During the period, the stockists get various types of discounts apart from cash discounts and it is generally given on the invoices. Ld.AR argued that discount given to stockists passed on to the customers, hence, the discount does not attract TDS. Therefore, he argued that the AO had erred in making the addition u/s.40(a)(ia) of the Act, treating the same as 'commission'. Ld.AR also submitted that the case of the assessee is squarely covered by the decision of the Co-ordinate

Bench of the Tribunal in assessee's own case in ITA Nos.917, 918 & 919/Hyd/2009, dt.02-07-2012 relating to AYs.2005-06 & 2006-07.

8. Per contra, the Ld.DR argued that the Hon'ble ITAT in the aforesaid case law relied upon by the assessee, remitted the matter back to the file of AO with a direction to examine the issue, hence argued that the issue may be sent to the file of the AO for reconsideration.

9. We have heard both the parties and perused the material placed on record. The contention of the assessee is the payment made was discount and not the commission. Whereas the department's contention is that the payment was commission and attracts the TDS u/s 194H of the Act. The assessee relied on the decision of this Tribunal in the assessee's own case for the earlier assessment year, wherein the Tribunal has dismissed the revenue's appeal on the finding given by the Ld.CIT(A) that the payment made to the stockists was discount, but not the commission in the relevant assessment year. The coordinate bench held that brokerage or commission envisaged u/s 194H is for the payment received by the person on behalf of another, for services rendered in the course of buying and selling of goods. In the instant case, the assessee has stated that the stockists

themselves are buying the goods and it cannot be said that they are rendering any services in the course of such buying of goods which will render any payment to them as commission. Though the AO stated that the facts are similar to that of A.Y.2006-07, the AO did not verify the facts and gave finding with regard to the nature of payment. The assessee also did not prove with the books of accounts the nature of payment. Therefore, we are of the considered view that the issue needs to be verified at the end of the AO to ascertain whether the payment is commission or discount with relevant vouchers of sales and the concerned accounts of the stockists. Hence, we remit the matter back to the file of the AO to verify the books of accounts, relevant vouchers and ascertain whether the payment is commission or discount. If the payment is in the nature of commission or brokerage, the payment needs to be disallowed u/s 40(a)(ia) of the Act for non deduction of tax at source u/s 194H of the Act. In case the payment is in the nature of discounts allowed on the sales the provisions of section 194H and the consequent disallowance does not attract. Accordingly, the appeal of the assessee on this ground is set aside and allowed for statistical purposes.

10. Ground No.4 is related to opening stock generated during trial run production. During the assessment proceedings, the AO found that the assessee has claimed the opening stock of finished goods of Rs.380.31 Lakhs in the opening stock inventories, whereas the said opening stock was not found in the closing stock of the immediately preceding assessment year. On a query from the AO, the assessee explained that the assessee has made the trial run production and initially the expenditure was debited to construction account. Pending clearance of trial run production the expenditure such as raw materials and other related expenses were capitalized and not debited to the Profit & Loss A/c. On testing trial run successfully, the stock generated out of trial run production found to be fit for sale, hence, transferred the stocks as well as the expenditure incurred during the trial run production to the Profit & Loss account. Since the stocks were taken in the closing stock account and the cost of production of the stock related to the trial run production was debited to the Profit & Loss A/c under the head 'opening stock' thus, submitted that there is no overstating of the expenditure or difference in opening stock. Not being impressed with the explanation offered by the assessee, the AO

viewed that assessee has debited the raw-material consumption relating to trial run production to the Profit & Loss A/c under the head opening stocks without taking the trial run stocks to trading account and hence the opening stock amount of Rs.380.31 lakhs was added back to the total income of the assessee.

11. Against the order of AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) dismissed the appeal of assessee. Hence, the assessee is in appeal before the Tribunal.

12. During the appeal hearing, Ld.AR reiterated the submissions made before the AO and submitted that the opening stock was related to Balasore Unit, which has started the production in the FY.2008-09, relevant to the assessment year under consideration, thus there was no question of closing stock in the earlier year and it was the stock generated out of trial production during the year under consideration. The Ld.AR further stated that initially, the assessee has debited the entire expenditure relating to the trial run production to the construction period account, but not to the Profit & Loss A/c. The stock generated out of the expenditure incurred during the construction period amounting to Rs.4.26 Lakhs was transferred to the

Profit & Loss A/c from 11-09-2008 to 31-03-2009, which was netted to Rs.3,80,30,600/-. The Ld.AR submitted that both the stock as well as the expenditure was taken to the Profit and loss account. The Ld.AR further submitted that the finished goods were transferred to the manufacturing and trading account, which increased the stocks and the relevant expenditure was grouped under opening stock and both the items were taken to Profit & Loss A/c. Since the expenditure as well as the closing stock was transferred to the Trading A/c, there was no difference in the closing stock / opening stock, hence, argued that there is no case for making addition, thus, the assessee requested to delete the addition made by the AO.

13. On the other hand, the Ld.DR argued that though the assessee stated to have taken the closing stocks relating to the raw-material, there was no evidence placed on record to show the sales or transfer of stock to trading and manufacturing account. Therefore, argued that the AO has rightly made the addition. Ld.DR further submitted that by taking the opening stock to the Profit & Loss A/c, without accounting the sales or increasing the closing stock with equal amount of the opening stock, the assessee has inflated the sales. Thus,

there was suppression of income to the extent of opening stock. Hence requested to uphold the order of lower authorities and dismiss the appeal of the assessee.

14. We have heard both the parties and perused the material placed on record. The AO made the addition representing the stocks of finished goods generated out of trial run production which was claimed as opening stock. The contention of the AO is that the assessee has claimed the expenditure relating to trial run production as opening stock in the year under consideration without having transferred the representing stock to the trading account. The contention of the assessee is that the sum of Rs.380.31 lakhs does not represent the closing stock of the earlier year and the same was related to the stocks generated out of trial run production and both the stock generated out of trial run production and the expenditure was transferred to the trading and manufacturing account of the year under consideration, therefore, there is no case for addition representing the opening stock. Though the Ld.AR also shown the transfer entries, the assessee has not placed any evidence relating to the stock transfer of trial run production to the trading account, with

stock register. In the subsequent year, the AO has called for the details of sales made out of trial run production but the assessee could not furnish the evidence before the AO. When the assessee claims that both expenditure on the trial run production and the stocks were transferred to the trading account, it is incumbent upon the assessee to establish the transfer of stocks. However, the assessee did not establish the sales or transfer of stock relating to trial run production to the stock account with the stock and sales registers. Therefore, we are of the considered opinion that the issue needs to be reconsidered after detailed examination of the stock register as well as the books of accounts to ascertain whether the assessee has really transferred the stock generated out of trial production to the trading and manufacturing account or not ? The assessee has to prove before the AO with regard to transfer of trial run production stocks to the stock register and the resultant revenue or sales was admitted in the Profit & Loss account. Thus, we remit the issue back to the file of the AO with a direction to reexamine the issue in the light of submission made by the assessee and the directions given in this order and decide the issue

afresh on merits. Appeal of the assessee on this ground is allowed for statistical purposes.

15. Ground No.5 is related to the commission paid to the Director. The AO found that the company has paid the commission of Rs.50 Lakhs to the Director. The AO has called for the details of the commission paid to the Director, the purpose for which it was paid along with supporting evidences. Since the assessee failed to explain the same, AO made the addition of Rs.50 Lakhs in the hands of assessee.

16. Against the order of AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) confirmed the order of AO. Hence, the assessee is in appeal before us.

17. During the appeal hearing, the Ld.AR submitted that the company has paid the commission to the whole time Director, who is looking after the operations of the company and the payment of commission is permitted by the Companies Act and the same was approved by the AGM held on 21-07-2008. The expenditure was debited to Profit & Loss A/c, which was also admitted by the recipients

in their returns, thus argued that there is no case for disallowance of commission in the hands of the company, hence, requested to delete the addition made by the AO and allow the appeal.

18. On the other hand, the Ld.DR strongly supported the orders of lower authorities.

19. We have heard both the parties and gone through the material placed on record. It is true that the company has paid the commission to the whole time Director, which was debited to the Profit & Loss A/c and the payment of commission was also approved in the AGM. As submitted by the Ld.AR, the tax was also deducted at source on payment of commission to the directors. Payment of commission is the business decision of the company and the assessing officer has no role in it. Therefore, there is no reason to make the disallowance of payment of commission, hence, we set aside the order of Ld.CIT(A) and delete the addition made by the AO. The appeal of the assessee on this ground is allowed.

20. In the result, the appeal of the assessee for the A.Y.2009-10 is partly allowed.

**ITA No.1702/Hyd/2014 (AY.2010-11)**

21. The AO passed the order u/s 143(3) dt.30-03-2013 and made the following additions/disallowances to the returned income:

		Amount (Rs)
a.	Claim of weighted deduction u/s.35(2AB)	1,62,15,011
b.	Hiring of chartered flight for travel of Shri C.K. Birla, Chairman of the appellant	23,16,625
c.	Payment for copyright infringement	2,88,400
d.	Profit on sale of trial run stock	68,27,000

22. Ground No.1 is related to the weighted deduction u/s.35(2AB) of the Act. This issue is involved for the A.Y.2010-11 to 2013-14 for 4 assessment years. During the assessment proceedings, the AO found that the assessee has claimed the deduction u/s.35(2AB) of the Act to the extent of Rs.1,62,15,011/- and the assessee failed to submit form 3CL from Department of Scientific & Industrial Research (DSIR) quantifying the expenditure. The assessee submitted before the AO that the application was made before the prescribed authority for the issue of form 3CL and hence requested to allow the deduction pending receipt of form 3CL/3CM from the DSIR. The assessee also

relied on the decision of the Co-ordinate Bench of Tribunal, Mumbai in the case of ACIT circle 6(3) vs M/s.Meco Instruments Pvt. Ltd., ITA No.4246/Mum/2009 dated 20<sup>th</sup> August 2010 supporting it's claim. The AO considered the provisions of the Act, the rules and the decisions relied upon by the assessee and observed that the Act prescribes approval for both facility and quantum of expenditure. The AO viewed that the facts of the case laws relied up on by the assessee are distinguishable and unless the quantum of expenditure is certified in form 3CL, weighted deduction cannot be worked out as per the provisions of the Act, therefore, held that certification u/s.3CL is mandatory requirement to allow the weighted deduction. Hence, the AO restricted the R&D expenses to the actual amounts spent i.e., Rs.108.10 Lakhs and excess claim of Rs.54,05,003/- was disallowed and added back to the income. However, the AO has given an observation that as and when the form 3CL is received, the assessee is free to make application u/s.154 of the Act and the AO would pass necessary rectification orders to allow the weighted deduction.

23. Against the order of AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) dismissed the appeal of assessee and

upheld the order of AO. Hence, the assessee is in appeal before the Tribunal.

24. During the appeal hearing, Ld.Counsel for the assessee argued that the assessee has made the application in form 3CK to the DSIR and had incurred in-house R&D expenditure of Rs.108.10 Lakhs on the research and development and the assessee is entitled for weighted deduction of one and half times of the expenditure incurred and accordingly requested to allow the deduction. The Ld. AR further submitted that the facility was approved by the DSIR and the issue of form 3CL is only procedural requirement. The Ld.AR argued that for the sake of procedural requirements, having spent the amounts benefit should not be denied. He relied on the decision of Commissioner of Income-tax – III.v. Sandan Vikas (India) Ltd., 207 taxmann 216) and the decision of ACIT Circle-6(3) vs Meco Instruments P Ltd, Mumbai in ITA No.4246/Mum/2009 dated 20<sup>th</sup> August 2010. The Ld.AR further submitted that the assessee has furnished the form 3CK as required under Rule 6 1B(iv) before the due date and the Government has approved the facility and the prescribed authorities required to pass an order in Form 3CM and 3CL which was not yet received by the

assessee. Form 3CL quantifying expenditure incurred and the quantum deduction under sub section 2AB of Section 35 of the Act required to be furnished electronically by the prescribed authority to the Pr.CCIT or the Chief Commissioner of Income Tax, who is having jurisdiction over the said company. The Ld.AR stated that the company has maintained separate books of account as required under Rule 6 (1B) and furnished the report and complied with all the requirements on the part of the company, therefore, requested to allow the deduction u/s 35(2AB). Alternatively, Ld.AR pleaded that the AO may be directed to allow the weighted deduction as and when the certificate in form No. 3CL is received, without the time limit for rectification u/s 154.

25. Per contra, the Ld.DR submitted that unless the approval from prescribed authority is received in form 3CL, the weighted deduction could not be quantified and it is not permissible to allow the weighted deduction. In the instant case, the approval from prescribed authority quantifying the expenditure in form 3CL is not received, Ld.DR supported the orders of the lower authorities and submitted that no interference is called-for in the orders of the lower authorities.

The Ld.DR fairly conceded for alternate claim of the assessee to allow the deduction as and when the approval is received.

26. We have heard both the parties and gone through the material placed on record. The disallowance made by the AO u/s 35(2AB) for AYs.2010-11 to 2013-14 year-wise, is as under :

A.Y	Amount of deduction Claimed	Amount disallowed
2010-11	1,62,15,011/-	54,05,003/-
2011-12	3,28,03,964/-	1,64,01,982/-
2012-13	4,63,94,097/-	2,31,97,035/-
2013-14	3,15,62,384/-	32,61,000/-

26.1. The assessee has furnished Form No.3CK to the Department of Scientific and Industrial Research(DSIR) but till date the approval of expenditure in form 3CL was not received by the department.. The AO allowed the actual expenditure and disallowed the weighted deduction claimed by the assessee for want of Form 3CL. As per Rule 6(1)(B) of Income Tax Rules, weighted deduction u/s 35(2AB) is allowed on receipt of order in Form No.3CL from the DSIR. So far, the said order u/r 3CL quantifying the expenditure incurred on in house research and development facility of the company was not yet

received. Though the assessment is related to A.Y.2011-12 and more than 7 years have been passed the prescribed authority has not passed the order in Form No.3CL. In the absence of Form No.3CL as provided u/s 35(2AB), deduction is not allowable. The legislature in its wisdom prescribed the terms and conditions for grant of deduction. Under Rule 6(1B) for grant of weighted deduction the assessee required to satisfy certain terms and conditions such as maintenance of separate books of accounts, the expenditure required to be spent only on research. All the sundry expenses, personal expenses, routine business expenditure are not to be included for claiming the deduction u/s 35(2AB). Therefore, quantification of expenditure required to be verified and certified by DSIR to prevent the misuse of the benefit. For this purpose, assessee has to submit the audit report along with Form 3CK and then only after satisfying the correctness, genuineness of expenditure and the quantification of expenditure the Government of India (DSIR) would issue form 3CL. On receipt of the Form 3CL the assessee would be entitled to weighted deduction. The AO is not permitted to grant the weighted deduction, when Rule prescribes to grant deduction on receipt Form 3CL. Certification of quantification and the genuineness

of expenditure is the look out of DSIR but not the Income Tax department. The assessee relied on the decision of Hon'ble Delhi High Court in the case of Sandan Vikas India Limited (supra) and Meco Instruments P.Ltd. (supra) both the case were distinguished by the Ld.AO in his order. The coordinate Bench of ITAT, Hyderabad on similar issue in the case of Electronics Corpn. of India Ltd.v.Assistant Commissioner of Income-tax, Circle, 2(2), Hyderabad\*[2012] 28 taxmann.com 280 (Hyd.) held as under:

*"As per the provisions of section 35(2AB) as applicable to the relevant Assessment year, the expenditure incurred by the assessee in any approved in-house research facility, to the extent of approved by the prescribed authority, is entitled to weighted deduction of 150 per cent of such approved expenditure. Therefore, the expenditure as approved by the DSIR in the certificate given by them in Form 3CL alone is to be granted weighted deduction. The DSIR in their certificate has certified expenditure eligible for weighted deduction as Rs. 3,126.02 lakhs. Therefore, it is not for either the assessing authority or the appellate authority to decide on the expenditure which will be entitled to weighted deduction under section 35(2AB). In fact, under section 35(2AB)(3) if any question arises under section 35 as to whether and if so, what extent any activities constitutes or constituted or any asset was used for scientific research, the matter should be referred to the appropriate authority whose decision will be final. In this case the appropriate authority is the DSIR. Therefore once the DSIR has certified the quantum of eligible R&D expenditure for the purposes of weighted deduction under section 35(2AB) the figure cannot be tampered with by the Tribunal. Even if the assessee is right in that there is a mistake in the certificate issued by the DSIR, same can only be rectified by DSIR and not the the Tribunal in appellate proceedings. Therefore, the decision of lower authorities in disallowing sum of Rs. 1,69,73,987 out of the claim made by the assessee is upheld. However, it is directed that in case DSIR corrects the amount of research and development expenditure on which the assessee is entitled weighted deduction for the assessment year under appeal, corresponding weighted deduction under section 35(2AB) shall be granted on receipt of the clarification from DSIR. Consequently, if the assessee is able to prove that any amount of expenditure in their in-house research and development facilities was omitted to*

*be considered by the DSIR for weighted deduction the same may be allowed as a deduction under section 35/37. [Para 17]."*

Hon'ble Supreme Court in the case of Commissioner of Customs (Import) Mumbai vs Dilip Kumar and ors in civil appeal No.3327 of 2007 dated 30<sup>th</sup> July 2018 held that while interpreting the exemption notifications the same should be interpreted strictly and where there is ambiguity in exemption notification, the benefit of such ambiguity cannot be claimed by the assessee and it must be interpreted in favour of the revenue.

26.2. In the instant case issue is with regard to weighted deduction u/s 35(2AB) is to be allowed after satisfying the conditions specified in Rule 6(1B) and the quantification of expenditure required to be approved by the DSIR in form 3CL. Therefore, the AO is not permitted to allow the deduction without the approval from the prescribed authority, hence, we do not find any reason to interfere with the order of the Ld.CIT(A). This view is supported by the decision of coordinate bench of ITAT, Hyderabad in Electronics Corpn. of India Ltd and the decision Hon'ble Apex court in Dilip Kumar and ors supra. Accordingly we, uphold the order of the Ld.CIT(A) and dismiss the appeal of the assessee. This issue is involved for the A.Ys 2010-11, 2011-12, 2012-13

and 2013-14. The appeals of the assessee for all the impugned assessment years on the issue of deduction u/s 35(2AB) are dismissed.

26.3. Alternately, the assessee has made a request to allow the deduction u/s 35(2AB) as and when the approval is received without the limitation u/s 154 for rectification. We find merit in the submission of the assessee for which the Ld.DR also did not object. Therefore, we, direct the AO to allow the weighted deduction as and when the approval in form 3CL is received without the limitation period u/s 154. Accordingly appeal of the assessee is allowed for statistical purpose on alternate ground.

27. The second issue in ground No.2 is related to the disallowance of Rs.23,16,625/- paid for hire charges for hiring chartered flight from M/s. Forum I Aviation Ltd., for travel of Shri C.K.Birla, Chairman of the assessee-company. In this connection, the assessee submitted that Shri C.K.Birla visited Hyderabad from Delhi in connection with AGM of the assessee-company held on 23-07-2009. It was also stated that the assessee-company used the chartered flight for the purpose of business and nothing else. Hence, the hire charges

amounting to Rs.23,16,625/- paid for hiring chartered flight should be allowed as deduction.

28. The AO observed from the annual report of the assessee that nowhere it was shown that the Chairman is entitled for travel by chartered flight and the terms and conditions of appointment did not provide for engaging the chartered flight and the assessee also did not explain the urgency for engaging the chartered flight as the AGM was a planned event. The chartered flight was flown from Delhi to Hyderabad on 23.07.2009, Hyderabad to Kolkata on 23.07.2009 and went back to Delhi from Kolkata on 25.07.2009. The AO made the enquiries and came to know that the company has hired the 7 seater Aircraft for this purpose . The assessee could not explain why the chartered flight was engaged from Kolkata to Hyderabad and back to Delhi. Thus, the AO held that the journey undertaken by the Chairman, Shri C.K.Birla was not exclusively for the purpose of assessee's business and accordingly disallowed the same. Against which the assessee filed appeal before the Ld.CIT(A) but did not succeed. Hence, the appeal is filed before us.

29. During the appeal hearing, Ld.AR submitted that assessee had incurred the expenditure of Rs.23,16,625/- for hire charges paid to

chartered flight hired from M/s. Forum I Aviation Ltd., for travel of Shri C.K. Birla, the Chairman of the assessee-company. The assessee submitted that Shri C.K. Birla visited Hyderabad from Delhi in connection with the AGM of the assessee-company. Since the chartered flight was used for the purpose of business, the Ld. AR argued that no disallowance is called for and accordingly requested to set aside the order of lower authorities and allow the appeal of the assessee.

30. On the other hand, Ld. DR argued that the Chairman, Shri C.K. Birla has travelled from Kolkata to Hyderabad by chartered flight. From Hyderabad, the Chairman visited Delhi. Thus, the entire expenditure was not wholly and exclusively laid out for the purpose of assessee's business. Ld. DR further submitted that the assessee did not furnish the terms and conditions of the employment of Shri C.K. Birla. Unless there is a sanction and the terms and conditions of employment permits the travel the expenditure cannot be held to be treated as wholly and exclusively laid out for the purpose of business. Therefore, argued that the lower authorities have rightly made the addition and no interference is called for.

31. We have heard both the parties and gone through the material placed on record. It is not disputed that the assessee has paid a sum of Rs.23,16,625/- towards hire charges to M/s.Forum I Aviation Ltd., for travel of Shri C.K. Birla, the Chairman of the company. Shri C.K.Birla is one of the business giants and industrialists and also happens to be the Director of many companies of Birla Group. However, the payment of chartered flight charges required to be incurred in terms of employment of Shri Birla. The assessee-company did not provide the terms and conditions of employment for engaging chartered flight for visiting of Shri C.K.Birla before the lower authorities. Though the assessee stated that the chartered flight was engaged in connection with AGM, the assessee did not show the business expediency for engaging the chartered flight since it was a planned event. In the absence of the terms and conditions of employment and the business expediency, we are unable to accept the contentions of Ld.AR that the expenditure was wholly and exclusively laid out for the purpose of business. Apart from the above, the chartered flight was engaged from Kolkata to Hyderabad and Hyderabad to Delhi and the assessee failed to furnish the reasons for making visit to Delhi.

Therefore, we are not convinced with the submission of the assessee that the chartered flight was engaged due to business expediency. The Chairman having attended the AGM is entitled to travel in the highest class in the flight. Accordingly we, direct the AO to allow the expenditure to the extent of business class or executive class, whichever is higher to Shri Birla and to one assistant and disallow the balance expenditure. This ground raised by assessee is partly allowed.

32. The third issue relates to the disallowance of expenditure of Rs.2,88,400/- paid for copyright infringement in out of court settlement with the Microsoft. The AO disallowed the expenditure on the ground that it was an out of court settlement hence viewed that the expenditure is not allowable. The assessee argued before the AO that it is settled issue that the courts permit out of court settlement for redressal of disputes instead of lingering the matters in the court for a long time. Hence, the assessee argued that the proposed disallowance of Rs.2,88,400/- is bad in law, hence, requested to allow the expenditure. However the AO did not satisfy with the explanation offered by the assessee and made the disallowance.

33. Against the order of AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) dismissed the appeal of assessee and upheld the order of AO. Hence, the assessee is in appeal before the Tribunal.

34. We have heard both the parties and gone through the material placed before us. In the instant case, the assessee paid for copyright of Microsoft using the software without proper authorization. Therefore, the Microsoft had initiated the legal action, which was settled out of court. Since the copy right was used for the purpose of business, though there was an infringement, which was settled out of court, we are of the opinion that the expenditure is required to be allowed. Accordingly, we set aside the order of the Ld.CIT(A) and allow the appeal of the assessee.

35. The fourth issue is with regard to addition of Rs.68.27 Lakhs relating to the gross profit on trial run production which was claimed as opening stock in the earlier year. The AO made the addition of Rs.68.27 Lakhs representing the Gross Profit on the value of opening stock added in the earlier year since the assessee failed to prove the transfer of stock to manufacturing and trading account or sales.

36. Against the order of AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) dismissed the appeal of assessee by upholding the order of AO. Hence, the assessee is in appeal before the Tribunal.

37. We have heard both the parties, perused the material placed on record. The AO made the addition on gross profit @ 17.95% on the opening stock of Rs.380.31 lakhs since the assessee failed to establish that the sales were admitted in the sales account in the year under consideration. During the appeal hearing also, the Ld.AR did not bring any evidence to show that the trial run production was transferred to the stock account. Since the issue for the A.Y.2009-10 is remitted back to the file of the AO to verify the transfer of expenditure as well as the stocks to trading account, this issue also require verification at the end of the AO. Accordingly, we remit the matter back to the file of the AO with a direction to re-examine the issue in the light of the discussion made for the A.Y.2009-10 and decide the issue afresh on merits on the outcome of the proceedings for the A.Y 2009-10 on this ground. Accordingly, the appeal of the assessee on this ground is allowed for statistical purpose. In the result, appeal of the assessee is allowed partly.

ITA No.1703/Hyd/2014 (AY.2011-12), ITA No.647/Hyd/2019 (A.Y.2012-13) and I.T.A.No.555/Hyd/2017 (A.Y.2013-14):

38. The first common issue for the A.Y. 2011-12 and for the A.Y.2012-13 to 2013-14 is the weighted deduction u/s 35(2AB). This was discussed in detail in A.Y.2010-11 and decided against the assessee. Accordingly the appeals of the assessee for the A.Y.2011-12 to 2013-14 are dismissed on this ground.

39. The next common issue involved for the AYs.2011-12 to 2013-14 is the disallowance of expenditure incurred for Chairman's travel by chartered flight. The AO has made the additions for the impugned assessment years as under:

S.No.	AY.	Rs.
1	2011-12	15,98,384
2	2012-13	28,96,393
3	2013-14	25,10,996

39.1. The facts of the case are identical to that of AY2010-11, hence, keeping in view of the status of Shri Birla being busy industrialist we direct the A.O. , to allow the highest class of Air fare to Shri Birla and his assistant in the place of chartered flight charges. The assessee should furnish the highest fare to the AO on the dates of travel.

Accordingly the appeals of the assessee on this issue for the A.Y.2011-12 to 2013-14 is partly allowed.

40 . The next issue for the A.Y.2011-12 is depreciation on wind mill. The assessee claimed the depreciation on wind mill to the extent of Rs.6,29,04,322/- . During the year under consideration, the assessee claimed to have commissioned the Vestas make Wind Electric Generator (WEG) V100 (1800KW) on 31.03.2011 at Gujarat and capitalised the expenditure of Rs.12,58,08,664/- on this account. The assessee furnished the copies of letter from Vestas for commissioning the electric generator. As per the letter dated 01.04.2011 issued by the Manager (Projects) of M/s Vestas Wind Technology India Pvt. Ltd., Electric generator was successfully commissioned on 31.03.2011 and further informed that the customer service executive would be in touch with the assessee to take lead of project in post commissioning period and to guide the assessee on service or generation related queries. The copy of the commissioning certificate from the Gujarat Energy Development Agency(GEDC) dated 07.04.2011 was also filed by the assessee certifying that the commissioning took place on 31.03.2011. The wind farm was connected to 33KV grid line of GETCO's Samakhiyali

substation. As per certificate of GEDC, the WEG was operated on 31.03.2011 from 16:50 hours to 17:15 hours for 25 minutes and generated 374 units of electricity. The AO during the assessment proceedings found that critical equipment like towers and turbine blades were delivered to the assessee on 16.03.2011 and 19.03.2011 at the site and he was of the opinion that it would take substantial time to unpack and assemble the plant as well as to lay the foundation, therefore, it is not possible to commission the plant before 31.03.2011. Since the plant was operated only for 25 minutes and the assessee failed to furnish the billing details, the AO disbelieved the commissioning of the plant. The assessee stated that the power was used for captive consumption and the AO was of the view that it was false assertion, because the unit was connected to GETCO substation and the power has to come from GETCO, which is an independent agency. The AO also found from the production sheet for the months of March, April and May 2011 and observed that the system did not stabilise till 14.04.2011 and plant did not function on 1<sup>st</sup> to 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 11<sup>th</sup> to 13<sup>th</sup> as there was zero power generation on these dates. Therefore, the AO viewed that the commissioning was only done around

14.04.2011 from which date, there was some stable power. Thus held that the commissioning certificate furnished from Gujarat Energy Development Agency and Vestas were only an arrangement with a view to claim the depreciation and the plant did not commence commercial operation in the financial year 2010-11. The AO further observed that the first billing of GETCO was done only during the period 01.04.2011 to 30.04.2011. Accordingly, the AO disallowed the depreciation and the additional depreciation claimed by the assessee.

41. Against the order of AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) dismissed the appeal of assessee. The Ld.CIT(A) observed that the plant was operated only for 25 minutes after commissioning and did not stabilize till 14/04/2011. The Ld.CIT(A) further observed that commissioning certificate received from Gujarat Energy Development Agency and Vestas were only an arrangement to claim the Depreciation and given finding that the plant did not commence commercial production in F.Y.2010-11. Before the Ld.CIT(A), the assessee also did not produce transmission of stable power to the grid on 31-03-2011. The Ld.CIT (A) was of the opinion that the assessee did not produce any conclusive proof to rebut the finding

of AO other than stating that the assessee did not bill the electricity generated since it was captively consumed. The Ld.CIT believed that the explanation of the assessee was an after thought and hence dismissed the appeal of the assessee. Against the order of the Ld. Ld.CIT (A) the assessee is in appeal before us.

42. During the appeal hearing, Ld.AR submitted that assessee has acquired the Vestas make Wind Electric Generator V100(1800KW) on 31-03-2011 at Gujarat for an amount of Rs.12,58,08,664/- and the amount was capitalized. The assessee produced the evidence for commissioning of the said wind mill from Gujarat Energy Development Agency, a Government of Gujarat Organisation and also commissioning letter from Vestas. Referring to Pg.5 of the Paper Book, the assessee furnished the copy of Gujarat Energy Development Agency dt.07.04.2011, certifying that the assessee had installed the wind mill on 31.03.2011 and had generated 347 units of electricity. The assessee also furnished a copy of Gujarat Energy transmission Corporation Ltd., in Pg.6, wherein the Gujarat GETCO has furnished the particulars of State Load Dispatch Centre(GOTRI) Vadodara furnishing the details of share of electricity generated by wind farm at Wandhiya for the month

March 2011 in Sr.No.3 of part B and it was certified that the assessee company's share of active energy was 6.903 mv. In pg.7 the assessee has furnished the copy of letter issued by Vestas, the Suppliers Wind Mill, certifying the commissioning of the Wind Mill on 31.03.2011 and submitted that the assessee had commissioned the wind mill on 31.03.2011 therefore, argued that the disallowance of depreciation is unjustified and requested to set aside the order of Ld.CIT(A) and allow the appeal of the assessee.

43. Per contra, the Ld.DR argued that it is noticed from the letter of Vestas that the critical equipment like towers and turban blades were delivered on 16.03.2011 and 19.03.2011 and it would take lot of time to unpack the towers and turbines as well as to lay foundation and for installation and commissioning the windmill. Though the Gujarat Energy Development Agency had certified that the wind mill was commissioned on 31-03-2011, the wind mill had generated electricity only for 25 minutes from 16.50 Hrs. to 17.50 Hrs and there was no proof of commissioning the unit completely. From the copy of the production sheet, the AO found that subsequent to 31.03.2011, there was no generation of power till 03.04.2011 and the system did not

stabilize till 14.04.2011 and the assessee did not explain the reasons as to why there was no generation of power subsequent to commissioning the unit. Therefore argued that the certificates were obtained from GEDC /GETCO and Vestas was with a view to claim the depreciation and argued that the plant did not commence in the FY.2011 and argued that the AO has rightly disallowed the depreciation which was confirmed by the Ld.CIT(A) and no interference is called-for in the order of the Ld.CIT(A).

44. We have heard both the parties and perused the material placed on record. As seen from the assessment order and the particulars furnished by the assessee, wind mill stated to be commissioned on 31.03.2011 and run for 25 minutes. The wind mill did not function for the remaining time on the said date and subsequently 1<sup>st</sup> to 3<sup>rd</sup> and 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> to 13<sup>th</sup> Apr, since there was zero power generation on these days. The AO also attached power generation report for Vandia site. As per the power generation report, the grid was available 100% on all these days. Once, the wind mill is commissioned properly, there is no reason for non functioning of the plant after commissioning. The assessee also did not explain the reasons for non functioning of the

wind mill on 31.03.2011 after 17:15 hrs. The wind mill was operated from 16:50 hrs to 17:50 hrs and did not function from 17:50 hrs onwards till 03.04.2011. Though the assessee has furnished the letter from Vestas stating that wind mill was successfully commissioned on 31.03.2011, it was stated in the said letter that the customer executive would stay in touch with the assessee for post commissioning work and the service on generation related queries. The letter further states that the assessee required to pay statutory taxes, duty cess etc., pertaining to WEG from the date of commencement to the respective government agencies. Further, insurances is also required to be taken for possible losses, damages arising out in the events of third party accidents liability etc. All the above evidences were not placed by the assessee either before the AO or before the Ld.CIT(A). Though the assessee stated to have commissioned the wind mill on 31.03.2011 as observed from the assessment order, critical equipment like towers and turbine blades were delivered on 16.03.2011 and 19.03.2011 at the site. According to the AO, substantial time would be taken to unpack and assemble the plant as well as to lay the foundation. The assessee did not submit the job card of the Vestas on daily basis from 19.03.2011 to

till the date of commissioning. Except the copy of the letter from Vestas and GEDA letter confirming the commissioning and GETCOs statement having generated the power, no other evidence was available with the assessee with regard to successful commissioning of the wind mill and transfer of the ownership to the assessee. The assessee required to make insurance for the plant and third party insurance before commissioning the wind mill which is not made available to the department. Similarly, the assessee also did not pay the statutory dues if any payable to the local government or the concerned agencies etc. pertaining to the WEG from the date of commissioning of the plant. Therefore, the issue with regard to installation and commissioning of WEG plant required to be examined in detail before allowing the depreciation and the additional depreciation for the year under consideration. Therefore, in our considered opinion, the issue needs to be remitted back to the file of the AO for examination of all the related issues and to decide the issue afresh on merits. Hence, we remit the issue to the file of the assessing officer to reconsider the issue afresh on merits. Accordingly, appeal of the assessee on this ground is allowed for statistical purpose.

45. The issue in Ground No.4 is related to the depreciation on computer software. This issue is involved for the A.Ys.2011-12 and 2012-13. During the assessment proceedings, AO found that the assessee has purchased license for usage of SonicWall for mail security for Rs.1,90,000/- and IBHAR performance manager software for Rs.7 Lakhs. Both these are found to be intangible assets for use of software which are in the nature of profit making apparatus and do not fall in the category of computers or operating system. Hence, the AO viewed that the depreciation is required to be allowed only @25% as against the claim of 60%. Accordingly, the AO disallowed the depreciation of 25% and 12.5% depending on the usage of the assets during the impugned assessment year.

46. Against the order of AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) dismissed the appeal of assessee and confirmed the addition made by the AO. Hence, the assessee is in appeal before the Tribunal.

47. We have heard both the parties and gone through the material placed on record. Assessee has purchased the computer operating system, which is part and parcel of the computer. Without the operating

system, the computer cannot be operated and the purpose would not be served. It is a settled issue that the computer software is not intangible asset and forms part of the computer. Therefore, we hold that the assessee is entitled for depreciation @60%. Accordingly, we set aside the orders of the lower authorities and allow the depreciation @60% and 50% of 60% for the assets put to use less than 180 days. Accordingly the appeal of the assessee on this ground for the AYs.2011-12 and 2012-13 are allowed.

48. The next issue is disallowance of foreign travel expenses for business purposes. The assessee had incurred the sum of Rs.7,10,930/- towards foreign travel expenses to Nigeria incurred for travel of Shri S.P.Tiwari and Shri P.S.Rao, Senior Executives of M/s.Super Core Industries. The details of expenditure incurred by the assessee are furnished in Pg.5 of the assessment order as under:

Date	Amount in Rs.	Description	Purpose
24-06-10	1,76,494	P.S.Rao – Nigeria Tour	Operations Head – Super Core Inds
30-11-10	1,76,377	-do-	-do-
12-02-11	83,538	S.P. Tiwari – HYD – DXB – LOS – Air ticket	MD Super Core Industries

26-12-10	53,603	-do-	-do-
10-02-11	39,036	-do-	-do-
14-12-10	3142	P.S.Rao HYD-DXB-LOS	Mgmt fee
26-12-10	1000	S.P.Tiwari	Other C
24-07-10	912	P.S.Rao	Overseas Med Insurance
10-02-11	740	S.P.Tiwari HYD-DXB-LOS	Mgmt fee
30-11-10	1,09,938	P.S.Rao Nigeria Tour	DA
24-06-10	66,150	P.S.Rao Nigeria Tour	DA
Total	7,10,930		

48.1. During the course of assessment proceedings, AO directed the assessee to justify the expenses. The assessee failed to justify the same. Therefore, the AO made addition of Rs.7,10,930/-and the similar additions were made for the AYs.2012-13 and 2013-14 as under

A.Y.	Amount in Rs.	Remarks
2012-13	9,16,216	Incurred for travel of Abhay Shankar and Sharad Damle of HIL
2013-14	3,25,637	Shri Sharad Damle, VP, HIL

For the A.Y. 2012-13, Shri Abhay Shankar, MD,HIL and Sharad Dalmia, Operations Head of HIL have travelled to Nigeria in relation to the work of Super Core Industries. Similarly for the A.Y.2013-14 Shri Sharad Dalmia,Sr.V.P Operations had travelled to Nigeria to attend the Board meeting of M/s.Super Core Industries. In all the occasions the assessee

could not explain the obligation on the part of the assessee to meet the travelling expenditure. The AO viewed that since the employees of the company have travelled to assist M/s. Super Core Industries, the expenditure ought to have borne by M/s. Super Core Industries but not by the assessee. Hence the AO disallowed the expenditure and added back to income on appeal.

49. The Ld CIT(A) confirmed the additions made by the AO, hence the assessee is in appeal before us.

50. During the appeal hearing, Ld.AR submitted that the expenditure was wholly and exclusively laid out for the purpose of business, hence the expenditure is allowable in the hands of the company. The Ld.AR further submitted that Shri P.S.Rao is an employee of Super Core Industries and Shri Tiwari was retainer during 01.09.2010 to 31.12.2010. In order to look after the overseas operations of M/s. Super Core Industries, Shri P.S.Rao and Shri Tiwari have visited Nigeria and provided operational guidelines to the team of Super Core Industries. Both of them have visited for development of business and the assessee is in obligation to meet the travel expenditure, hence, requested to allow the same.

51. On the other hand the Ld.DR argued that there was no business expediency for the assessee to visit Nigeria. The expenditure was not relatable to the assessee and the assessee could not establish the need for incurring such expenditure. The Ld.DR further submitted that for the A.Ys 2012-13 and 2013-14 though the Executives of the assessee company visited Nigeria, the assessee failed to substantiate the reason for incurring the expenditure by the assessee company instead of Super Core Industries. Thus argued that the expenditure on foreign travel to Nigeria has no business connection of the assessee. Hence, requested to uphold the order of the Ld.CIT(A).

52. We heard both the parties and observe from the arguments and the orders of the lower authorities that the expenditure was not incurred for the purpose of assessee's business and the expenditure was incurred in connection with Nigerian company, the assessee did not establish the business expediency of the expenditure incurred in the hands of the assessee-company relating to Nigerian company. During the appeal hearing also the assessee could not explain the business obligation to visit Nigeria. Therefore, we do not find any reason to interfere with the order of lower authorities. Hence, we confirm the

order of lower authorities and dismiss the appeal of the assessee on this ground.

53. The next issue raised in AYs.2011-12 and 2012-13 is denial of TDS credit. The assessee submitted that the AO has not allowed the credit for TDS for the amount of Rs.38,243/- for the AY.2011-12 and Rs.64,576/- for the AY.2012-13.

54. We have heard both the parties and gone through the material placed on record. It is the mandatory obligation of the AO to allow the credit for the taxes paid by the assessee. Therefore, we direct the AO to verify the taxes deducted at source and allow the credit for the prepaid taxes correctly. In the result, this ground raised by assessee is allowed for statistical purposes.

55. The next issue is related to loss on market to market (MTM) valuation of foreign forward contracts. The assessee has raised additional ground vide petition under Rule 11 of the ITAT Rules vide letter dt.08.01.2018 for the A.Y.2011-12. After hearing both the sides, the additional ground raised by assessee is admitted.

55.1. This issue is involved for the AYs.2011-12, 2012-13 & 2013-14 and the addition made by the AO for the A.Y.2011-12 to 2013-14 is as under :

A.Y.	MTM Loss
2011-12	Rs.27,27,934/-
2012-13	Rs.13,48,381/-
2013-14	Rs.10,01,400/-

55.2. During the assessment proceedings, the AO found that the assessee claimed losses on account of market to market in the case of forward contracts and the contracts were entered into cover the buyers credit. As MTM losses are contingent in nature and are not allowable as per the instruction of CBDT vide No.3/2010, dt.23.03.2010, the loss claimed by the assessee was disallowed and added back to the income in the respective assessment years.

56. Against the order of AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) dismissed the appeal of assessee. Hence, the assessee is in appeal before the Tribunal.

57. We have heard both the parties and gone through the material placed on record. The issue with regard to allowability of expenditure on account of market to market losses on forward contracts is settled issue as per the judgment of Hon'ble Supreme Court in the case of CIT Vs. [179 taxmann326(SC) wherein the Hon'ble Supreme Court held that the losses suffered in respect of revenue liability on account of such difference on the date of balance sheet is an allowable expenditure u/s.37(1) of the Act. We find that the case of assessee is squarely covered by the decision of Hon'ble Supreme Court, hence we set aside the order of Ld.CIT(A) and allow the appeal of the assessee on this ground.

58. In the result, appeals of the assessee for the A.Y. 2009-10 to 2013-14 are partly allowed.

Sd/-  
**(V. DURGA RAO)**  
**JUDICIALMEMBER**

Sd/-  
**(D.S. SUNDER SINGH)**  
**ACCOUNTANT MEMBER**

Hyderabad, Dated: 22.11.2019

TNMM & LR

*Copy to :*

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- 2.The Addl.Commissioner of Income Tax, Range-2, Hyderabad.*
- 3. The ACIT, Circle-2(2), Hyderabad.*
- 4. CIT(Appeals)-III, Hyderabad.*
- 5. CIT(Appeals)-2, Guntur.*
- 6. The CIT-II, Hyderabad.*
- 7. The Pr.CIT-2, Hyderabad.*
- 8. D.R. ITAT, Hyderabad.*
- 9. Guard File.*